STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	**)**	
	)	
vs.	**)**	
	)	**Docket No. 04-0606**
1-800-RECONEX, Inc. et al.	**)**	
Complaint pursuant to Section 10-108 of the	**)**	
Illinois Public Utilities Act 220 ILCS 5/10-108	**)**	
and 83 Illinois Administrative Code 200.170.	**)**	

SBC ILLINOIS' CONSOLIDATED RESPONSE TO THE CLECS' MOTIONS

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Illinois Bell Telephone Company ("SBC Illinois"), by its attorneys, hereby files this consolidated response to the motions to dismiss and other motions filed by ACN Communications Services, Inc., *et al.* ("ACN *et al.*")[1]; American Farm Bureau, Inc. ("American Farm"); Easton Telecom Services, Inc. ("Easton"); Global Crossing Local Services, Inc.; the Joint CLECs ("Joint CLECs")[2]; a second group also calling itself the Joint CLECs ("Access One *et al.*")[3]; Home Telenetworks, Inc. ("Home"); Madison River Communications LLC; McLeodUSA Telecommunications Services, Inc.[4]; Now Communications, Inc.; NuVox Communications of Illinois, Inc.; Poltel, LLC; Qwest Communications Corp. and Qwest

[1] This group includes ACN Communications Services, Inc.; BullsEye Telecom, Inc.; DSLnet Communications, LLC; Globalcom, Inc.; Looking Glass Networks, Inc.; Neutral Tandem-Illinois, LLC; and RCN Telecom Services of Illinois, Inc.

[2] The Joint CLECs include: AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago (collectively, "AT&T"); Cbeyond Communications, LLC; First Communications, LLC; ICG Communications, Inc.; KMC Telecom V, Inc.; Nuvox Communications of Illinois, Inc.; LDMI Telecommunications, Inc.; Talk America Inc.; New Edge Network, Inc.; Nii Communications, Ltd.; US Xchange of Illinois, d/b/a Choice One Communications; Z-Tel Communications, Inc.; Grid4 Communications, Inc.; MTCO Communications, Inc.; McLeodUSA Telecommunications Services, Inc.; TDS Metrocom, LLC; Adams TelSystems, Inc.; Allegiance Illinois, Inc.; and OnFiber Carrier Services, Inc.

[3] The second group of Joint CLECs includes: Access One, Inc.; BitWise Communications, Inc.; CIMCO Communications, Inc.; Forte Communications, Inc.; Grid 4 Communications, Inc.; Intrado Inc.; MidWest Telecom of America, Inc.; Mpower Communications Corporation; Novacon Holdings LLC; Royal Phone Company LLC; and King City Telephone, LLC.

[4] McLeodUSA also joined the Joint CLEC motion.

Interprise America, Inc. ("Qwest"); TDS Metrocom, LLC[5]; Think 12 Corp. d/b/a Hello Depot ("Think 12"); and XO Illinois, Inc.

I. INTRODUCTION AND SUMMARY

SBC Illinois' interconnection agreements are badly out-of-date. Eight years ago, and again five years ago, the FCC put in place maximum unbundling rules that required SBC Illinois and other ILECs to make available on an unbundled basis virtually every facility in their local exchange networks. Although SBC Illinois believed those rules to be unlawful, it nevertheless gave effect to them by entering into interconnection agreements that provide for pervasive, almost unlimited access to SBC Illinois' facilities, including those facilities that are suitable for competitive supply and that the CLECs are accordingly fully capable of providing for themselves.

Beyond all legitimate dispute, it is now clear that those FCC rules – on which the parties expressly relied in fashioning their interconnection agreements – are unlawful. The Supreme Court held as much in 1999 in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), when it vacated the FCC's first set of maximum unbundling rules, and the D.C. Circuit confirmed that result in 2002 in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), when it vacated the FCC's attempt to reinstate those same discredited rules. Moreover, on remand from *USTA I*, the FCC's *Triennial Review Order*[6] restricted unbundling in several important respects, and, in the instances where it perpetuated overly broad unbundling, the D.C. Circuit, in *USTA II*, again vacated the resulting rules.[7]

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[5] TDS Metrocom, LLC also joined the Joint CLEC motion.

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[7] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Association of Regulatory Utility Commissioners, et al., Petitioners v. United States Telecom Association, et al.*, 2004 U.S. LEXIS 6710, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

It is thus clear that the era of maximum unbundling rules is over, and that, as a matter of law, CLECs are not entitled to such broad access to SBC Illinois' facilities. And it is equally clear that the CLECs recognize this fact. Indeed, last month one of them (AT&T), in the very first sentence of its comments to the FCC on remand from *USTA II*, told the FCC that it no longer even *wants* "rules that require the unbundling of mass-market switching and the maintenance of UNE-P."[8]

Even so, however, most CLECs have nonetheless tried to stave off the inevitable by refusing to respond in a constructive manner to the efforts of SBC Illinois to negotiate agreement language that would conform its interconnection agreements to governing federal law. The reason for that is simple: these CLECs know that the gravy train is running out of track, but they want to put off the day when they have to compete without overly broad access to facilities that are fully capable of competitive supply. As a result, they are trying to retain in their interconnection agreements the out-dated and unlawful maximum unbundling rules that the FCC first put in place eight years ago as long as possible. And the motions to dismiss at issue here are part of that delay strategy.

This proceeding provides the appropriate opportunity to resolve these issues once and for all and on a consistent basis for the entire industry in Illinois. As the FCC has finally recognized, and as the courts have made resoundingly clear, the overly broad unbundling obligations at issue here have substantially hindered investment and innovation in the telecommunications industry. The binding judgments of the FCC and the courts should be given effect, so that SBC Illinois' interconnection agreements are in compliance with applicable legal requirements.

[8] Comments of AT&T Corp at i, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 4, 2004).

II. BACKGROUND

A. LEGAL BACKGROUND

The past year has seen significant change in the federal regulations governing unbundling. The FCC's *Triennial Review Order* became effective on October 2, 2003. There, the FCC expressly acknowledged the "limitations inherent in competition based on the shared use of infrastructure through network unbundling." 18 FCC Rcd at 16984, ¶ 3. Indeed, the FCC said that it was "very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.*

With this principle in mind, the FCC eliminated or reduced the scope of unbundling obligations in many respects. In brief, the FCC held that:

- "[I]ncumbent LECs do not have to provide unbundled access to the high frequency portion of their loops." *Id.* at 16988, ¶ 7.
- "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops." *Id.*
- ILECs "are no longer required to unbundle OCn loops." *Id.*
- ILECs "must offer unbundled access to dark fiber loops, DS3 loops (limited to 2 loops per requesting carrier per customer location) and DS1 loops except at specified customer locations where states have found no impairment pursuant to Commission-delegated authority to conduct a more granular review." *Id.*
- ILECs do not have to offer "unbundled OCn level transport," and, it further held that dark fiber, DS3, and DS1 transport were "each independently subject to a granular route-specific review by the states to identify available wholesale facilities." *Id.* at 16989, ¶ 7.
- ILECs do not have to offer "unbundled local circuit switching when serving the enterprise market." *Id.*
- States "may identify particular markets where there is no impairment" as to mass-market switches. *Id.*

- ? "[C]arriers are impaired without shared transport only to the extent that carriers are impaired without access to unbundled switching." *Id.*

- ? ILECs "are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs) . . . ." *Id.*

- ? ILECs "are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching." *Id.*

- ? CLECs "may order new combinations of unbundled network elements (UNEs), including the loop- transport combination (enhanced extended link, or EEL), to the extent that the requested network elements are unbundled." *Id.* at 16990, ¶ 7.

- ? CLECs must additionally meet strict eligibility criteria before they can order the enhanced extended link. *Id.* at 16990-91, ¶ 7.

The FCC made clear its expectation that the *Triennial Review Order* would "help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers." *Id.* at 16985, ¶ 6. The FCC also knew, however, that the CLECs would resist that result, and that they would prefer to continue to rely on access to ILEC facilities, even where those facilities are capable of competitive supply. As a result, at the same time as it provided "individual carriers . . . the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment," *id.* at 17403-04, ¶ 700, the FCC took several steps intended to minimize delay.

First, negotiations over new agreement language, the FCC stated, should begin "*immediately*," because any "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703 (emphasis added). Indeed, invoking the obligation to negotiate in good faith, the FCC stated that "parties may not refuse to negotiate *any subset* of the rules we adopt herein." *Id.* at 17406, ¶ 706 (emphasis added). In addition, the FCC instructed that "state commission[s] should be able to resolve" any disputes over contract

language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17406, ¶ 704 (emphasis added). Finally, the FCC emphatically stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would not take effect until there has been a "final and unappealable" change in the law. Such a change, the FCC observed, had *already* happened, when its prior unbundling rules had been vacated. Thus, "[g]iven that the prior UNE rules have been vacated and replaced *today* by new rules, we believe that it would be *unreasonable and contrary to public policy* to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

The *Triennial Review Order* was then appealed to the D.C. Circuit, which for the most part affirmed the instances in which the FCC limited incumbents' unbundling obligations.[9] By contrast, the D.C. Circuit *overturned* other portions of the *Triennial Review Order* that required pervasive unbundling, including all delegations of authority to state commissions, as well as the FCC's findings of impairment for mass-market switching and high-capacity loops and transport.[10]

The D.C. Circuit's mandate issued on June 16, 2004, and the Supreme Court recently denied certiorari.[11] In the meantime, the FCC issued its *Interim Order*,[12] in which it required

[9] *See, e.g., USTA II*, 359 F.3d at 582 (upholding FCC's decision not to unbundle broadband capacity of hybrid loops); *id*. at 584 (upholding FCC's decision not to unbundle "fiber-to-the-home" loops); *id*. at 585 (affirming FCC's decision not to unbundle line sharing); *id*. at 587 (upholding FCC's decision not to unbundle enterprise switching); *id.* at 587-88 (upholding FCC's decision not to unbundle signaling or call-related databases except in narrow circumstances); *id*. at 588 (upholding FCC's decision to require unbundling of shared transport only in situations where switching is unbundled); *id*. at 589 (upholding FCC's decision that § 271 does not require either § 251 TELRIC pricing for elements unbundled only under § 271 or the combination of elements); and, *id*. at 592-93 (upholding FCC's eligibility criteria for CLEC access to the Enhanced Extended Link).

[10] *See, e.g., id*. at 594 (vacating the FCC's nationwide impairment findings as to DS1, DS3, dark fiber, and mass market switching; wireless access to dedicated transport; and all portions of the *Triennial Review Order* that involve the "subdelegation to state commissions of decision-making authority over impairment determinations").

[11] *See National Association of Regulatory Utility Commissioners, et al., Petitioners v. United States Telecom Association, et al.*, 2004 U.S. LEXIS 6710, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

ILECs, on an interim basis, to "continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." *Id.* ¶ 1 (footnotes omitted). That interim obligation ends after six months, or after the publication of final unbundling rules, whichever comes earlier. *Id.*[13]

The FCC emphasized its belief that "unbundling rules based on a preference for facilities-based competition will provide incentives for both incumbent LECs and competitors to innovate and invest," and stated that "we renew our commitment to promoting the development of facilities-based competition and seek to adopt unbundling rules that will achieve this end." *Id.* ¶ 2. Thus, the FCC emphasized that "[i]n order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements." *Id.* ¶ 22. Indeed, the FCC specifically stated that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.*

The FCC stressed this point again in the next paragraph: "[W]hile we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence

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[12] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-179, 2004 FCC LEXIS 4717 (Aug. 20, 2004) ("*Interim Order*").

[13] The FCC also noted in dicta that it *may* establish a second six-month transition period along with certain UNE rate increases "in the event that our final rules decline to require unbundled access to any element or elements that were available to requesting carriers as of June 15, 2004." *Id.* ¶ 29. The FCC has made clear, however, that this proposal has no binding legal force. Opposition of Respondents to Petition for Writ of Mandamus at 8-9, *United States Telecom Association, v. FCC*, No. 00-1012 (D.C. Cir. filed Sept. 16, 2004)

of unbundling requirements for switching, enterprise market loops, and dedicated transport . . ." *Id.* ¶ 23 (emphasis in original). It then explained the reason for allowing such a presumption: "Thus, whatever alterations are approved or deemed approved by the relevant state commission *may take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Id.* (emphasis added).

B. FACTUAL BACKGROUND

In the spring of 2002, following the D.C. Circuit's invalidation of the FCC's maximum unbundling rules in *USTA I*, SBC Illinois timely invoked the change-of-law processes in its interconnection agreements, notifying CLECs of SBC's intent to negotiate – and, if necessary, arbitrate – new agreement language. The FCC, however, quickly signaled its intent to put in place new rules to replace the ones the D.C. Circuit vacated. As a result, SBC Illinois abated its efforts to conform its agreements to governing law, and instead awaited the FCC's new rules.

Those new rules were set out in the *Triennial Review Order*, which, as noted at the outset, took effect on October 2, 2003. At that point, SBC Illinois again timely and properly invoked the contractual amendment process set forth in its interconnection agreements. Specifically, following the effective date of the *Triennial Review Order*, SBC Illinois provided the CLEC parties written notice of the need to update their interconnection agreements to reflect the FCC's findings. Later, after the issuance of the D.C. Circuit's mandate in *USTA II*, on June 16, 2004, SBC Illinois notified CLECs with as-yet-unmodified interconnection agreements of the continuing need to conform their interconnection agreements to governing law, this time with the findings of *USTA II*. For the most part, however, the CLECs refused to engage in constructive

(describing "additional transitional requirements" set out in the *Interim Order* as a "proposal" that may, or may not, be adopted by the FCC).

responses to SBC Illinois' overtures, and, as result, the bulk of SBC Illinois' interconnection agreements remain out of compliance with governing law.

Accordingly, SBC Illinois initiated this proceeding. Accompanying its Petition, SBC Illinois filed a proposed contract amendment that expressly incorporates governing federal law, and that is intended to be added to SBC Illinois' existing interconnection agreements. In brief, section 1.1 lists all of the elements that are no longer required to be unbundled under federal law, while section 2.1 expressly includes the obligations imposed by the *Interim Order*. Section 3.1 then provides for a 30-day notice and transition period in the event that the *Interim Order* expires and the FCC eliminates unbundling for any of the *USTA II* elements. At that point, SBC Illinois' language would allow 30 days for the parties to implement binding federal law by either discontinuing the UNE or migrating the CLEC's service to an alternate service arrangement (*i.e.*, a market-based resale or access arrangement).

III. ARGUMENT

In considering the CLECs' motions to dismiss, the Commission must accept all SBC Illinois' factual allegations as true and construe them in the light most favorable to the complainant. *Bethea v. Peoples Gas Light and Coke Co.*, 2004 Ill. PUC LEXIS 316, *5-6 (May 26, 2004); *see also AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois*, 1998 Ill. PUC LEXIS 713, *7-8 (Aug. 12, 1998). The Commission's standard of review for motions to dismiss is consistent with the standard used by the Illinois courts in considering motions to dismiss for failure to state a claim in civil actions. Thus, in ruling on a motion to dismiss, the complaint's factual allegations are to be accepted as true and "viewed in the light most favorable to the plaintiff." *Flournoy v. Ameritech*, 814 N.E.2d 585, 586 (3rd Dist. 2004); *Mid-west Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d

911, 913 (1st Dist. 2004); *see also Independent Trust Corp. v. Hurwick*, 814 N.E.2d 895, 902 (1st Dist. 2004).

The CLECs' motions fall well short of this demanding standard. Their primary claim – that the law is too "unsettled" to proceed – ignores both the fact that the *Triennial Review Order*'s limitations on unbundling have been upheld on appeal, and the FCC's express invitation to ILECs to initiate proceedings *now* to implement changes in unbundling rules. And their suggestion that SBC Illinois has failed to exhaust efforts to negotiate with individual carriers is contrary to fact. Indeed, as discussed in more detail below, some CLECs themselves – including many of the same ones that have sought dismissal here – have initiated a proceeding in Michigan that, like this one, seeks to incorporate existing federal law into the parties' interconnection agreements. The CLECs' simultaneous suggestion that SBC Illinois is not authorized to pursue the same course here is both hypocritical and wrong. Finally, the CLECs' additional claims – that additional sources of law, including state law, section 271, and the *SBC/Ameritech Merger Order*, require continued unbundling – are both irrelevant on a motion to dismiss and wrong.

A. SBC ILLINOIS' COMPLAINT IS RIPE

The CLECs' principal argument is that SBC Illinois' complaint is not ripe for resolution. In their view, because the FCC is actively considering *new* unbundling rules, it would be premature to excise the *old* unbundling rules from the parties' interconnection agreements, particularly because the FCC, in the *Interim Order*, put in place "stand-still" rules to last for six months (or until the FCC issues new rules, whichever is sooner). *See, e.g.*, ACN *et al.* at 2, 8-11; Joint CLECs at 7-8, 16-20. Along the same lines, the CLECs argue that it would be a "waste of resources" to pursue this proceeding now. *See, e.g.*, ACN *et al.* at 8-14.

As an initial matter, however, these claims simply ignore the fact that the *Triennial Review Order* was *upheld* by the D.C. Circuit insofar as it *limited* ILEC unbundling obligations. None of those limitations – which are detailed above – are under consideration by the FCC in its ongoing rulemaking. On the contrary, they reflect the FCC's binding determinations, they have been upheld by the D.C. Circuit, they are no longer subject to appeal at the Supreme Court, and they must now be incorporated into existing interconnection agreements. For this reason alone, the CLECs' ripeness claim must fail.

In this regard, the CLECs are flatly misleading when they refer to the supposed "absence of any clear guiding directives or legal standards from the FCC." ACN *et al.* at 9. The *Triennial Review Order* is perfectly clear and certain, it has been upheld in most relevant respects, and it has been awaiting implementation for over a year now. It is simply false to claim that the *Triennial Review Order* is somehow unsettled, let alone that it is characterized by an "absence . . . of legal standards."[14] Indeed, the *Triennial Review Order* was vacated *only* to the extent it imposed overly broad unbundling obligations on ILECs. To the extent it *limited* those obligations, it was sustained. As a result, there can be no plausible argument that it would be "premature" to implement those limitations.

Nor are movants correct in asserting that SBC Illinois has somehow acted inconsistently in that it previously urged this Commission (and others) to cease impairment proceedings under the *Triennial Review Order*. ACN *et al.* at 9. SBC Illinois asked for such abatement only after the D.C. Circuit had *vacated* the FCC's attempts to allow state commissions to conduct such impairment proceedings. *See USTA II*, 359 F.3d at 568. Thus, SBC Illinois was merely urging

[14] The ACN group also claims that any decision here "would likely be rendered obsolete" in short fashion. ACN *et al*. at 9. Again, this is false as to the *Triennial Review Order*; there is simply no reason to think that the FCC plans to revise the rules that the D.C. Circuit upheld.

those state commissions to comply with binding federal law. But here, SBC Illinois' Complaint *must* be heard, and for precisely the same reason: to bring interconnection agreements into compliance with binding federal law. SBC Illinois' actions have, therefore, been perfectly consistent.

To be sure, SBC Illinois' Complaint also seeks to implement the results of *USTA II*, insofar as it vacated FCC determinations (*i.e.*, as to mass-market switching and high-capacity loops and transport). In the CLECs' view, rather than implementing the rules as they exist today, the parties should wait still longer, until the FCC issues yet another set of rules. But this is merely a recipe for more delay (and is a particularly egregious way to confuse the issues in order to delay compliance with the year-old *Triennial Review Order*). Once the FCC issues new rules, numerous parties will undoubtedly appeal, giving the CLECs yet another excuse to request delay in revising their agreements. As noted at the outset, certain CLECs – in particular, AT&T – are not even *asking* the FCC to unbundle mass-market switching and thus to retain the UNE-P. The suggestion that the parties should nonetheless wait for the FCC to conclude its proceeding – which would in turn lead to still more requests for delay while any appeals are pursued – is untenable.

In any event, the contention that the parties must await the FCC's resolution of its ongoing proceeding is inconsistent with the FCC's own views on the matter. As discussed above, the *Interim Order* itself emphasized that there should be a "speedy transition" to any new rules regarding mass-market switching and high-capacity loops and transport. *Id.* ¶ 22. Along the same lines, the FCC said that "whatever alterations are approved or deemed approved by the relevant state commission" should "*take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue." *Id.* ¶ 23. Towards that end, the FCC "*expressly*

preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings," *id.* ¶ 22 (emphasis added), and it directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* None of this would make any sense if the FCC thought that it would be "premature" to initiate any change-of-law proceedings. On the contrary, not only is it not premature to engage in such proceedings, it is an express right of SBC Illinois to do so.

Indeed, the CLECs themselves expressly admit as much. One group of them, for example, acknowledges that SBC's initiation of this proceeding is "permitted," and questions only whether "it is the right thing to do." ACN *et al.* at 2-3. The Joint CLECs, rather bizarrely, appear to concede that ILECs have authority to initiate change of law proceedings, and question only whether the *Interim Order* "*requires* that the state commissions act upon [such] proceedings." Joint CLECs at 16. These dispositive concessions make clear that even the CLECs recognize that, under the *Interim Order*, ILECs have every right to initiate change of law proceedings in order to conform their interconnection agreements to governing federal law, precisely as SBC Illinois has done here.[15]

Despite these concessions, some CLECs point to a passage in the *Interim Rules Order* that provides that "whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state

[15] The Commission should reject CLEC arguments that the SBC Illinois amendment does not accurately reflect the law following the *TRO*. Joint CLECs (at 20-23) and ACN *et al.* (at 17). Since the Commission must accept all SBC Illinois' factual allegations as true, and since SBC Illinois' Amended Complaint alleges that its proposed amendment (Exhibit "B") accurately reflects the law as revised in the *TRO* and *USTA II* (¶ 28), this argument should be rejected out of hand. CLECs are also wrong on the substance of their allegation. Joint CLECs complain that Exhibit "B" wrongfully eliminates "entrance facilities" as UNEs, but the Commission's decision in the XO Arbitration (Docket No. 04-0371 at 78) does just that. Joint CLEC's argument with respect to DS1 and DS3 loops is equally flawed because it is based on their speculation as to what the FCC *might do* on

public utility commissions . . . is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible." ACN *et al.* at 9-10 (quoting *Interim Order* at ¶ 17); Joint CLECs at 19 (same); Easton at 2-3 (same); Now at 3 (same); Poltel at 2-3; Think 12 at 2-3 (same).

The CLECs' reliance on this statement is misplaced. In context, the FCC intended this statement solely as a means to justify the stand-still aspect of the *Interim Order – i.e.,* the requirement that ILECs continue to make available *USTA II*-affected UNEs for six months or until the FCC issues new rules, whichever is sooner. At the same time, as discussed, the FCC "expressly preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings," *Interim Order* ¶ 22, and directed that such proceedings should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* SBC Illinois' proposed amendment is fully consistent with *both* mandates, taking full account of the FCC's stand-still requirements while attempting to conform its existing agreements to governing law.

The CLECs are wrong to contend that, because the FCC is expected to issue new UNE rules in the future, this proceeding would be a waste of resources. If the FCC eliminates unbundling requirements, Section 1.1 of SBC's proposed amendment would take effect, eliminating the requirement from the CLEC's agreement. If the FCC reinstates unbundling of mass-market switching and/or high-capacity loops or transport, Section 2.1.1.1 provides that the element in question "shall continue to be provided by SBC Illinois in accordance with rates, terms and conditions of this Agreements . . . that were in effect prior to the Effective Date of this Amendment, to the extent they are consistent with the new FCC rule(s) . . ." Both outcomes are

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remand and ignores the fact that under currently existing law unbundling obligations with respect to DS1 and DS3 loops were vacated by *USTA II*.

accordingly *already* covered by SBC Illinois' Amendment. The CLECs' suggestion that the Commission will necessarily have to revisit these issues is accordingly wrong.

Nor are movants correct that the precedents of other state commissions provide support for the CLECs' plea for more delay. *See* ACN *et al.* at 11-13. The bulk of those decisions were made in the immediate wake of the *USTA II* ruling, at which point it was unclear whether the D.C. Circuit would grant reconsideration or a stay (it did not), whether the Supreme Court would grant certiorari (it did not), and what the FCC would do on remand. Now, the situation is much more stable and certain. The FCC has set out clear interim rules, signaled its intent that any new final rules should be immediately implemented, and, most importantly, expressly authorized ILECs to initiate change of law proceedings such as this one.

B. SBC ILLINOIS' COMPLAINT IS PROCEDURALLY PROPER

1. The Complaint Complies With Illinois Law

Several CLECs argue that SBC Illinois' Complaint is procedurally defective, claiming that Sections 10-108 and 4-101 of the Public Utilities Act do not confer jurisdiction. 220 ILCS 5/10-108, 5/4-101. *See*, *e.g.*, ACN *et al.* at 14-15; Joint CLECs at 4-6; Access One *et al.* at 9-11. They contend that Section 10-108 jurisdiction is limited to complaints alleging violation of the PUA or a Commission rule or order, and that SBC Illinois has not alleged any such violations. *See*, *e.g.*, ACN *et al.* at 14-15; Joint CLECs at 5. Thus, although they concede that the Commission has jurisdiction to consider and impose interconnection agreements and amendments pursuant to Section 252, they quibble over the manner in which the Commission's jurisdiction has been invoked. They contend that the Commission can only grant relief through the specific arbitration procedures set forth by Section 252 of the federal Act. *ACN et al.* at 15.[16]

[16] The CLECs, themselves, appear to be uncertain about their position. The Joint CLECs, for example, at one point state that the "Commission has jurisdiction to address complaints for resolution of disputes arising under

Contrary to the CLECs' contentions, the Commission has clear authority to consider issues related to interconnection agreements under the complaint provisions of the PUA. The Commission has entertained complaint proceedings alleging violation of the terms of interconnection agreements from the outset of the ICA regime mandated by the federal Act. For example, in 1997, Teleport Communications Group, Inc., MCI and WorldCom (then a separate company from MCI) filed complaints under the PUA contending that SBC Illinois had violated their interconnection agreements by refusing to pay reciprocal compensation for local calls terminated to Information Service Providers. *Order in Docket Nos. 97-0404/97-0519/97-0525*, adopted March 11, 1998. The Commission duly resolved the complaints, concluding that SBC Illinois was obligated to pay reciprocal compensation for these calls under the terms of its interconnection agreements. Prior to ruling on the contested issues, the Commission specifically acknowledged its complaint jurisdiction:

> "In the present consolidated cases, Complainants have asked this Commission to enforce certain provisions of the Commission-approved interconnection agreements between Ameritech Illinois and the individual complainants. This Commission's jurisdiction *under the Public Utilities Act* and Section 252 of the Telecommunications Act of 1996 (the "Act") to interpret and enforce the terms of interconnection agreements is not disputed. *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997)." *Id*. at 10 (emphasis added).

The Commission's complaint jurisdiction over interconnection agreement disputes was further confirmed in legislative changes to the PUA which became effective in 2001. At that time, the Illinois General Assembly provided carriers a *second* complaint procedure for enforcement of interconnection agreements in Sections 13-514 and 13-515 (the so-called "fast track" process). 220 ILCS 5/13-514, 5/13-515. One of the *per se* impediments to competition under this Section is:

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these interconnection agreements," but then later claim that neither Sections 10-108 nor 4-101 "confer jurisdiction on the Commission to grant the relief sought by SBC." Joint CLECs at 2, 5.

> "(8) *violating the terms of or unreasonably delaying implementation of an interconnection agreement* entered into pursuant to Section 252 of the federal telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to customers. . ." 220 ILCS 5/514(8) (emphasis added).

Although Section 13-514 only applies to *certain* interconnection agreement disputes (i.e., a violation that "unreasonably delays, increases the cost, or impedes the availability of telecommunications services to customers"), it clearly disproves the contention that state complaint processes do not apply at all.[17]

In support of their position, the CLECs rely on a ruling by the Administrative Law Judge in the XO Arbitration proceeding (Docket No. 04-0371). ACN *et al*. at 16; Access One *et al*. at 10-11. This ruling simply represented the views of one Administrative Law Judge, and it was not dispositive of the proceeding in any event. The *Commission* has not ruled on this issue.

Since the Commission has jurisdiction over this Complaint under Section 10-108 of the PUA, it is not necessary to reach the question of the Commission's jurisdiction under Section 4-101. However, the Commission itself has frequently cited to Section 4-101 when initiating enforcement and other similar actions. For example, in the marketing complaint case brought by the Citizens Utility Board against SBC Illinois alleging misleading marketing practices in connection with its CallPack and Simplifive plans, the Commission relied on Section 4-101 in support of its jurisdiction to proscribe unlawful practices and impose affirmative duties to engage in just and reasonable behavior:

> "As suggested in the preceding section of this Order, the Commission believes that misleading marketing practices can constitute unjust and unreasonable conduct within the meaning of the Public Utilities Act. *The Legislature has vested the Commission with 'general supervision of all public utilities,' 220 ILCS 5/4-101,* and the 'duty . . . to see

[17] The Commission has consistently allowed carriers to pursue alleged violations of Section 13-514 under either the "fast track" procedures in Section 13-515 or conventional complaint procedures under Section 10-108. See *e.g., Order in Docket No. 03-0553,* adopted June 9, 2004 (complaint brought by TDS Metrocom under Section 10-108 alleging, *inter alia*, a violation of Section 13-514).

> that the . . . statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed.' 220 ILCS 5/4-102. *We are confident that these general grants of authority include the specific power to supervise the marketing of public utility services to the public*. Therefore, we hold that we have the power to apply Sections 8-501 and 9-250 of the Public Utilities Act to the allegations of CUB's complaint and, if warranted, use the remedial powers set forth in those and other sections to proscribe unlawful practices and impose affirmatively duties promoting just and reasonable behavior." *Order in Docket No. 00-0043*, adopted January 24, 2001, at 10 (emphasis added).

The Commission similarly relied on Section 4-101 for jurisdictional authority in other proceedings. See e.g., *Illinois Comm. Comm. v. Illinois Power Company*, 2003 Ill. PUC LEXIS 1031 at *14-15 (December 11, 2003) (citing to Section 4-101 as an "independent basis" for initiating an investigation into certain transactions entered into by Illinois Power and to determine whether they should be approved or prohibited under Section 16-111(g)(vi) of the Act); *Ill. Comm. Comm. v. Central Ill. Light Company*, 2001 Ill. PUC LEXIS 603 at *15-16 (May 9, 2001) (citing Section 4-101 in support of jurisdiction to impose tree trimming obligations on CILCO); *Complaint as to Billing*, 1999 Ill. PUC LEXIS 697 at *12-13, (September 22, 1999) (citing to Section 4-101 in support of jurisdiction to hear dispute over application of Ni-Gas transportation rates and tariffs); *Chebanse Grain and Lumber Co. v. Northern Illinois Gas Company*, 1997 Ill. PUC LEXIS 821 at *16-17, (December 3, 1997) (citing Section 4-101 in support of jurisdiction to hear dispute over Ni-Gas contract).

In substance, the parties are confusing the source of the Commission's *substantive authority* to resolve interconnection agreement disputes – which clearly derives from Section 252 of the federal Act – with the *procedural mechanisms* by which such disputes can be presented to the Commission. These procedural mechanisms can include, depending on the facts of each case, arbitration proceedings under Section 252, complaint proceedings under Section 10-108 or complaint proceedings under Section 13-514. In an analogous situation, the Commission

determined in the UNE rate proceeding that, although it was *substantively* establishing TELRIC-compliant rates under Section 252, there was no bar to using traditional state law *procedures* to do so, *i.e.*, a tariff proceeding under Section 9-201. *Order in Docket No. 02-0864*, adopted June 9, 2004, at 293. It is well established that the Commission has the authority to shape the proceedings before it. *Antioch Milling v. Pub. Serv. Co. of Northern Ill.*, 4 Ill. 2d 200, 210 (1954). In this proceeding, where over 100 CLECs are involved, where only legal issues are in dispute, where the parties' positions are firmly entrenched, and where the Commission will clearly have to resolve the dispute on an industry-wide basis, the use of Section 10-108 clearly comports with the interests of administrative efficiency and is well within the Commission's legal authority.

In short, SBC Illinois' Complaint is subject to this Commission's jurisdiction and may be brought under these sections of the PUA. In order to withstand a Motion to Dismiss, SBC Illinois must simply have set forth reasonable grounds for its Complaint. As described *infra*, SBC Illinois has met that standard.

2. The Complaint Complies With Section 252

Some CLECs argue that SBC Illinois has improperly attempted to "bypass" 47 U.S.C. § 252. *See, e.g.*, ACN *et al.* at 15-16. In this regard, the ACN group cites the Sixth Circuit's decision in *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002). *See, e.g.*, ACN *et al.* at 16. These CLECs also claim that SBC Illinois failed to provide all the documentation listed in section 252(b)(2)(A), including a list of unresolved issues and the parties' position on each issue. *See, e.g.*, ACN *et al.* at 15; *see generally* Global Crossing.

But the CLECs do not – because they cannot – demonstrate that *all* of the section 252 requirements apply to SBC Illinois' petition to amend existing agreements. Admittedly, the FCC

has held that the "section 252(b) *timetable*" applies. *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added). But the FCC did not hold that a petition seeking to *amend* current agreements would necessarily have to comply with all of the formal requirements that parties must meet when they seek to arbitrate a *brand new* agreement. Significantly, the Joint CLECs appear to concede that SBC Illinois can bring a change in law dispute such as this one to the Commission as a complaint. Joint CLECs at 2 ("Although this Commission has jurisdiction to address complaints for resolution of disputes arising under these interconnection agreements, SBC must satisfy the preconditions of those agreement before bringing any action to the Commission").

It is also incorrect to assert that SBC Illinois' complaint is somehow precluded by *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) or *Wisconsin Bell v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003). *See* ACN *et al.* at 16. In each of these cases, a state commission had issued an order requiring the ILEC "to file tariffs with the state, 'setting forth the rates, terms, and conditions' under which competitors might acquire network elements and services." *Verizon North*, 309 F.3d at 939 (citation omitted); *see also Bie*, 340 F.3d at 442-43. The Sixth Circuit struck down the Michigan commission's order, as it "completely bypasse[d] and ignore[d] the detailed process for interconnection set out by Congress . . . ." *Id.* at 941. Similarly, the Seventh Circuit faulted the Wisconsin process for "enabl[ing] would-be entrants to bypass the federally ordained procedure." *Bie*, 340 F.3d at 445.

But this Commission has done nothing of the sort, nor is SBC Illinois asking the Commission to establish anything akin to a tariff that would replace interconnection agreements. Instead, SBC Illinois is merely making what should be a routine request to amend existing interconnection agreements. *Verizon North* and *Bie* simply do not have anything to say about

that situation, except to the extent that they necessarily *approve* the process of arbitrating interconnection agreements.

Finally, the CLECs are wrong to suggest that the Ninth Circuit's decision in *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), deprives this Commission of "jurisdiction" over SBC Illinois' complaint. *See, e.g.*, Joint CLECs at 8-9; Now at 2; Easton at 2; Think 12 at 2; Access One *et al.* at 1-4; Poltel at 1-2. *Pac West* involved a dispute over whether Internet-bound traffic is subject to reciprocal compensation. The California commission had issued "generic orders" that purported to *interpret* the terms of interconnection agreements in California. *See* 325 F.3d at 1121. Specifically, the commission there held that "reciprocal compensation provisions of applicable interconnection agreements applied to ISP-bound traffic in California," but it did so without considering the specific terms of the ILECs' agreements. *Id.* In response, the Ninth Circuit concluded that the state commission could not impose a *substantive* obligation upon an ILEC, under the guise of "interpreting" the ILECs' interconnection agreements, without purporting to consider or construe the language in the ILEC's agreements. *See id.* at 1125-26, 1128.

In *Pac West*, then, the Ninth Circuit faulted the state commission for imposing a substantive obligation on an ILEC in a manner that circumvented the ILECs' interconnection agreements. Contrary to the CLECs' apparent understanding, SBC Illinois is not seeking such relief here. Rather, SBC Illinois is seeking to *conform* the language of its existing interconnection agreements to governing federal law. In other words, whereas the California commission in *Pac West* departed from the 1996 Act's framework of interconnection agreements, SBC Illinois is seeking to work *within* that framework. Thus, far from being contrary to the decision in *Pac West*, SBC Illinois' approach here is fully consistent with it.

C. SBC ILLINOIS' COMPLAINT CONFORMS TO THE TERMS OF ITS INTERCONNECTION AGREEMENTS

The CLECs make much of the fact that SBC Illinois' agreements contain language that requires the parties to work together in the first instance to revise the parties' interconnection agreements. *See, e.g.*, Joint CLECs at 6-7, 9-13; Easton at 1-2; McLeodUSA at 2-4; Now at 1-2; NuVox at 2-4; Poltel at 1-2; TDS at 2-3; Think12 at 1-2; Access One *et al.* at 4-5, 7-9; Madison at 3-5. In their view, rather than initiate this proceeding, SBC Illinois should be required to continue to engage each individual CLEC in negotiations, notwithstanding the fact that most of the CLECs' have failed to respond in a remotely constructive manner, or have already rejected SBC Illinois' efforts and language proposals, as discussed in more detail below. *See, e.g.*, ACN *et al.* at 21 (moving for a "sufficient pleading" and a "bill of particulars" on this issue).[18]

1. CLECs Are Themselves Pursuing Similar Relief In Another Form

As an initial matter, this claim is impossible to square with the proceeding numerous CLECs – including several of the same CLECs that have sought to dismiss SBC Illinois' complaint[19] – recently initiated in Michigan. The express purpose of that proceeding is to investigate "the vacatur of the rules promulgated by the FCC in its Triennial Review Order and/or the effect of the FCC's August 20, 2004 'interim' order on remand, and if the Commission determines that these events constitute a change in law, to solicit recommendations from interested parties on the appropriate procedures to incorporate, where necessary, modified terms in current tariffs and/or interconnection agreements." *See* Application to Initiate

[18] It is well-established that bills of particular may be demanded only where a claim is so general that adverse parties ". . . cannot properly plead or prepare for trial . . ." *Colby v. Wilson*, 320 Ill. 416, 420-21 (1926). It is apparent from the motions to dismiss filed by the requesting CLECs that they are well aware of the facts and circumstances surrounding SBC Illinois' Complaint and their request should be denied.

[19] The parties in Michigan included at least six of the parties here: AT&T Communications of Michigan, Inc., LDMI Telecommunications, Inc., TCG Detroit, TDS Metrocom LLC, Talk America Inc., and XO Michigan, Inc.

Investigation, Case No. U-14303 (Mich. PSC filed Sept. 30, 2004).[20] If the CLECs can implement such a generic proceeding in Michigan, it is difficult to understand why SBC Illinois cannot do so here.[21]

2. The CLECs' Claims Of Surprise Are Disingenuous

In any event, as noted at the outset, SBC Illinois filed this proceeding because there is no other practical and timely way to conform SBC Illinois' interconnection agreements to current federal law. Contrary to the CLECs' conclusory assertion, SBC Illinois did not blindside them with its filing. On the contrary, the CLECs' refusal to engage SBC Illinois in constructive negotiations left SBC Illinois with no choice other than to resort to this Commission.

As the CLECs acknowledge, their agreements clearly contemplate that they are to be amended in the event of a change in governing law.[22] There can be no doubt that such a change has taken place. The *Triennial Review Order* limited unbundling in several important respects, the D.C. Circuit Court's *USTA II* decision vacated certain unbundling rules promulgated in that same order. In the wake of these dramatic changes, the amendment required by the change in law provisions of the interconnection agreements will effectively remove contractual terms requiring SBC Illinois to provide UNEs that have been declassified or vacated – some for more than a year now. Realizing that they are nearing the end of the road, CLECs seek to stave off the

[20] Available at: http://efile.mpsc.cis.state.mi.us/efile/docs/14303/0001.pdf

[21] Given the CLECs' application in Michigan, it is especially galling that AT&T, as well as other CLECs, actually claim that SBC Illinois' complaint is so meritless as to justify an award of attorneys' fees. *See, e.g.*, Joint CLEC at 23-24; *see also, e.g.*, Access One *et al.* at 12-13.

[22] Joint CLECs (at 4) and Access One *et al.* (at 6) argue that SBC Illinois has repudiated its change of law obligations under its ICAs. SBC Illinois has done nothing of the sort. SBC Illinois' ICAs contain within them provisions for amending the ICA to comport with changes in law and it is precisely those change in law provisions that the Amended Complaint invokes to revise those ICAs. Docket 04-0419 (the CLEC UNE Standstill docket) has nothing to do with this issue. There, the CLECs filed a complaint to make certain that SBC Illinois took no unilateral action with respect to UNE access in the wake of the *USTA II* order. In the present docket, SBC Illinois has invoked a *Commission* process to get *Commission* approval to amend the ICAs to implement the *Triennial Review Order* and *USTA II*. There is nothing unilateral about that.

inevitable by accusing SBC Illinois of failing or refusing to follow applicable change of law and dispute resolution provisions. But the truth of the matter is that, as alleged in the Complaint – which, again, must be taken as true for purposes of a motion to dismiss – SBC provided ample notice and opportunity for CLECs to amend their agreement pursuant to those provisions, but the CLECs failed to do so.[23]

Several CLECs argue that SBC Illinois' action is improper because they were never provided a copy of the UNE Conforming Amendment attached to SBC Illinois' Amended Complaint as Exhibit B ("Exhibit B").[24] American Farm at 2, Easton at 1-2, Joint CLECs at 13, 15, Now Communications at 1-2, Poltel at 1-2, Qwest at 2 and Think 12 at 2. What these CLECs do not say is that CLECs have long been aware of SBC Illinois' position on the narrowing of unbundling requirements that occurred in the TRO, as well as in the *USTA II* proceedings; those positions have been publicly argued in state and federal proceedings for over a year now. CLECs were even delivered a prior version of Exhibit B in March, 2004. This prior version is known as the "Lawful UNE Amendment" and a copy of this amendment attached hereto as Attachment A. Even a cursory examination of the Lawful UNE Amendment shows that it raises all of the relevant issues that are contained in Exhibit B. For example, the Lawful UNE Amendment, like Exhibit B, states that SBC Illinois need no longer provide certain UNEs that

[23] In fact, CLECs who filed a formal answer to SBC Illinois' Complaint have admitted, among other things, that (1) interconnection agreements in Illinois include terms relating to certain UNEs that have been modified or vacated by FCC rules or court order; (2) SBC Illinois has requested that they execute a proposed contract amendment, and that they and SBC Illinois have not been able to agree on any amendments related to the TRO; and (3) that SBC Illinois timely and properly invoked the contractual change-in-law amendment process set forth in the agreements, and provided CLECs with written notice of the continuing need to update their agreements to reflect the TRO and USTA II findings. See Verified Answer of ACN, *et al*, paras. 8, 10, 24 and 25.

[24] SBC Illinois does not concede that it had an obligation to provide CLECs with proposed amendment language pursuant to applicable change in law and/or dispute resolution provisions. Those provisions, in fact, do not require either party to provide a written language proposal; rather, both parties are required to amend the interconnection agreement, preferably by negotiating an amendment to conform the agreement to governing law. Accordingly, it is as much an obligation of CLEC's to provide contract language proposals as it is of SBC Illinois', and is not a prerequisite to the filing of this proceeding.

are no longer required under the *Triennial Review Order* and *USTA II* and lists those specific UNEs. (See, e.g., section 1.4 of the Lawful UNE Amendment and section 1.1 of Exhibit B). Exhibit B is more detailed, of course, because it was prepared well after the USTA II mandate issued, and after the FCC's Interim Order was released. Accordingly, its language is informed by both of those events in a way the Lawful UNE Amendment could not have been. Both of the proposed amendments contain notice and transition procedures and both contain a mechanism whereby access to UNEs that are "declassified" by regulators in the future is terminated. In light of the close similarity between Exhibit B and prior versions, it would be pointless to do as CLECs request – i.e., dismiss this Complaint just so SBC Illinois could redistribute Exhibit B and wait some period of time before re-filing the Complaint. CLECs are no more likely to agree to this form of UNE amendment than they were to the Lawful UNE Amendment which they soundly rejected. For these reasons, the Commission can confidently conclude that SBC Illinois has properly alleged that it appropriately requested CLECs to enter into a UNE amendment and that it properly provided a copy of such an amendment to CLECs well in advance of this proceeding.

3. "Parallel" Proceedings To Arbitrate New Or Successor Agreements Under Sections 251/252 Are Not Duplicative Of This Proceeding

A few CLECs point out in passing that they have pending negotiations for replacement of ICAs with SBC Illinois, and argue that the complaint proceeding is "duplicative." McLeodUSA at 4; TDS at 4. However, what those CLECs fail to consider is that while the parties are negotiating a new agreement, that is not the same as an amendment of the current agreement to conform it to federal law – the relief sought by SBC Illinois in filing this Complaint. Instead, in those other proceedings, the parties are arbitrating a *new* interconnection agreement that will not take effect until some unknown date in the future.

Here, however, SBC Illinois seeks to conform the CLECs' *current* interconnection agreements to applicable federal law. The current agreements purport to require that SBC Illinois provide unbundled network elements that SBC Illinois is no longer obligated to provide. The current interconnection agreements also require their amendment – now – and this proceeding was filed to accomplish that in a timely fashion. *See* change of law provisions cited in McLeodUSA at 2; TDS at 2. While a decision in this complaint proceeding may clarify some of the issues raised by the CLECs in their separate arbitration proceedings, this proceeding is not duplicative.[25]

4. XO Must Remain A Party To This Complaint

XO separately moves for dismissal of the Complaint on the grounds that it recently completed an arbitration with SBC Illinois in Docket No. 04-0371 to revise the UNE Appendix of its ICA to reflect the *Triennial Review Order*, *USTA II* and the *Interim Order*. XO at 2. What XO does not explain in its Motion is that it is engaged in a confusing, inconsistent, and ultimately unclear strategy on its interconnection arrangement with SBC Illinois. Until this situation is resolved, XO should remain a party to this proceeding.

XO currently has an effective ICA that expires in August of 2005. For reasons still unknown to SBC Illinois, XO filed an arbitration petition this year under section 252 of the 1996 Act to amend the UNE Appendix of that ICA (Docket No. 04-0371). At the same time, however, XO was negotiating a replacement ICA by requesting to exercise its rights under section 252(i) of the 1996 Act to opt into another existing ICA. Why XO wanted to exercise its

[25] Home TeleNetworks moved to dismiss on the grounds that it is ready to execute a proposed amendment along the lines requested by SBC Illinois. SBC Illinois has provided Home TeleNetworks with an appropriate UNE amendment for signature. Assuming that SBC Illinois and Home Networks are able to successfully amend their ICA, Home TeleNetwork's participation in this proceeding will no longer be required. SBC Illinois is continuing to work with other CLECs along these lines in order to eliminate parties wherever possible.

opt-in rights at the same time it was aggressively arbitrating changes to its existing ICA makes no sense because the two strategies are mutually exclusive. Either a CLEC sticks with its existing ICA and amends it to reflect changes in law, or it opts into another ICA in its entirety and abides by the terms of that new ICA. XO has been attempting to do both.

XO's strategy became a little clearer on October 18, 2004, when for the first time it revealed that it intends to opt into another ICA and then seek to compel SBC Illinois to replace the UNE appendix in that ICA with the revised UNE Appendix to its current ICA – the one to be revised pursuant to Docket No. 04-0371. This is not permitted under the FCC's recently revised opt-in rules that require a CLEC to opt into an entire ICA – not just portions of an ICA. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order (released July 13, 2003) ¶¶ 11-24. Under the new "all or nothing" rules, XO cannot adopt only a *portion* of another ICA, as it proposes to do. Even if that were permissible, XO could not then import into the ICA the revised UNE Appendix from its existing ICA because its own ICA cannot be opted into on a piecemeal basis.[26] Nonetheless, based on a follow-up XO letter dated October 28, 2004, XO appears intent on this gambit.

At this point, it is simply not clear what the outcome of these machinations will be. XO and SBC Illinois may be able to agree on some arrangement acceptable to both sides. If that arrangement involves XO opting into the ICA of another CLEC that is a party to this proceeding, then XO should clearly remain part of this proceeding too, because its ICA will then have UNE language that needs to be changed to reflect the *Triennial Review Order* and *USTA II*. XO and SBC Illinois may be forced into litigation, in which case no one can foresee what may happen. Finally, XO and SBC Illinois may be able to agree on a resolution that eliminates the need for

[26] It would also be impossible to do because once XO opts into a new ICA, its existing ICA would terminate. XO obviously cannot be party to two different ICAs at the same time.

XO to participate in this proceeding. If that happens, SBC Illinois will promptly move to dismiss XO.

Until XO clarifies exactly what it intends to do, and until SBC Illinois and the Commission can satisfy themselves that XO's plan are lawful, XO must remain a party to this proceeding so that any ICA it opts into can be conformed to governing law, consistent with all other ICAs in Illinois.

D. CLECs Have Had Ample Opportunity To Negotiate A Resolution

Numerous CLECs complain that SBC Illinois has failed to negotiate over its proposed amendment as fully as it might have. *See, e.g.*, Joint CLECs at 6-7, 13-16; McLeodUSA at 3-4; Now at 1; Easton at 1; ACN *et al.* at 5-6; Poltel at 1; Madison at 3-4;[27] TDS at 3-4; Access One *et al.* at 5-6; Qwest at 2-4 (including motion for bill of particulars on this point).

These allegations are untrue. SBC Illinois repeatedly advised the CLECs of its desire to modify its agreements. As made clear in the attachments to this pleading, SBC sent written notices, with proposed contract language, expeditiously upon the occurrence of each change in law event, and making proposed contract language available. Specifically, SBC Illinois sent the CLECs notices regarding *USTA I* and the *Triennial Review Order* on or about October 30, 2003,[28] and additional notices regarding *USTA II* on or about July 13, 2004. As the attachments make clear, each notice informed the CLECs of the need to amend their agreements, and each also constituted notice of a dispute.

[27] Madison claims that, on October 18, 2004, "the Commission held a hearing regarding the approval of a *negotiated* (emphasis added) amendment to the interconnection agreement between SBC and Madison." This is misleading because the amendment in question had nothing to do with the availability of UNEs under the *TRO* or *USTA II* decisions. Rather, it involved amending Madison's ICA to incorporate the new UNE prices approved by the Commission in Docket No. 02-0864 and nothing more (Docket No. 04-0570).

[28] Indeed, some CLECs received *two* notices, with *two* proposals for amending contract language (the first on or about October 30, 2003, and the second on or about March 11, 2004).

Using ACN Communications Services, Inc. as one example,[29] SBC Illinois' notice letters accomplished the following things:

October 30, 2003 Letter (see ACN Attachment 1 hereto):

- ? Notified ACN of the need to amend the agreement pursuant to *USTA I* and the *Triennial Review Order*.
- ? Notified ACN that if agreement was not reached by March 12, 2004, resolution of the dispute would be pursued.
- ? Designated a representative for SBC (Keisha Rivers).

March 11, 2004 Letter (see ACN Attachment 2 hereto):

- ? Notified ACN of continuing need to amend the agreement pursuant to *USTA I* and the *Triennial Review Order*.
- ? Notified ACN of the impending issuance of the *USTA II* mandate and the additional need to amend the agreement to conform to *USTA II* as well.
- ? Informed ACN that SBC reserved all positions with regard to proceedings to resolve disputes arising out of the October 30, 2003 notice letter, and that, "[i]f you do not execute a satisfactory conforming contract amendment by March 19, 2004, we will pursue dispute resolution on remaining unresolved issues."
- ? Enclosed contract language (the "Lawful UNE Amendment") designed to shorten and simplify the amendment of the agreement.
- ? Enclosed a form that ACN could use to request a signature ready Lawful UNE Amendment on a 24-hour basis.
- ? Explained how the Amendment was intended to work.
- ? Designated a representative for SBC (Keisha Rivers).

July 13, 2004 Letter (see ACN Attachment 3 hereto):

- ? Notified ACN of the issuance of the *USTA II* mandate and the need to conform the agreement to governing unbundling law.
- ? Reminded ACN that the agreement still needed to be amended for *USTA I* and the *Triennial Review Order*, as well.
- ? Enclosed contract language (the "Post USTA II Amendment") to specifically remove the *USTA II*-vacated network elements from the agreement.
- ? Explained how the Amendment was intended to work.
- ? Designated a representative for SBC (CLEC's Assigned Account Manager).

[29] ACN Communications is the lead party in the "ACN *et al*" group of CLECs represented by Swidler Berlin.

1. Specific Examples Illustrate The Necessity (And Propriety) Of This Proceeding

a. ACN Communications

In ACN's case (as was the case with other CLECs in Illinois), when SBC Illinois did not receive a response to its October 30, 2003, TRO notice letter, SBC Illinois sent a follow-up letter on November 11, 2003, reminding ACN about SBC Illinois' October TRO letter, and stating that if ACN did not agree to a negotiations schedule, SBC Illinois would have no choice but to pursue other remedies in order to amend the agreement. See ACN Attachment 4. Despite receiving the November 11, 2003 reminder letter (see ACN Attachment 1), ACN did not engage with SBC Illinois. Along with the other CLECs, SBC Illinois sent ACN the second notice letter on March 11, 2004, along with its Lawful UNE Amendment proposal. ACN did not engage, but on March 18, 2004, and again on August 5, 2004, the law firm Swidler Berlin Shereff Friedman, LLP rejected both SBC Illinois' Lawful UNE Amendment and its *USTA II* Amendment on behalf of ACN and several other CLECs.

The Swidler, Berlin March 18, 2004, letter is attached to the Motion to Dismiss filed by ACN *et al*, and rejects SBC Illinois' attempts to amend ACN's interconnection agreement in at least seven different ways:

> Rejection No. 1: " . . . *it would be inappropriate and inefficient* for SBC to attempt to seek formal dispute resolution over the terms of its 'Lawful UNE Amendment' . . . we propose that the parties initiate negotiations over SBC's proposed amendment if and when a change of law has occurred under the terms of their Agreements and when each party's opening position for such negotiations has become final."
>
> Rejection No. 2: "In any case, while SBC's proposal purports to respond to the TRO and the USTA II decision [fn omitted], nothing in the proposed 'Lawful UNE Amendment' addresses any of the substantive conclusions of either. Thus, *the proposed amendment cannot fairly be characterized as a reflection of changes to the substantive unbundling obligations that either party might claim have been altered*. . . At such time that SBC is prepared to propose such substantive changes,

the CLECs will comply with their obligations under the law and the Agreement to negotiate."

Rejection No. 3: *"It would be premature to initiate negotiations or formal dispute resolution . . ."*

Rejection No. 4: "Moreover, *CLECs are unable to negotiate constructively with SBC . . .*"

Rejection No. 5: "Where new interconnection agreement arbitrations are now pending . . . *it should not be necessary to separately negotiate the 'Lawful UNE Amendment' or subsequent proposed amendments in these circumstances*."

Rejection No. 6: "Finally, *SBC is wrong in contending that . . . the effect of the court's decision is the ultimate elimination of certain legal unbundling obligations* . . . At most, if it ever becomes effective, USTA II would vacate rules and remand certain issues to the FCC, but would not necessarily preclude the FCC from adopting new unbundling regulations that are at least as expansive as those set forth in the parties' interconnection agreements."

Rejection No. 7: *Furthermore, even if USTA II becomes effective and no replacement rules from the FCC have been adopted, the unbundling policy and requirements set forth by Congress remain clear and effective* under the statutory requirements of Sections 251 and 271. . . Thus, *regardless of whether any of the parties' agreements would deem an effective USTA II as a change of law, there would be no resulting changes to the parties' agreements for a state commission to implement at this time.*"

SBC Illinois' response is provided as ACN Attachment 5.

The second Swidler, Berlin rejection letter on behalf of ACN was delivered after SBC Illinois sent its July 13, 2004 *USTA II* Notice and proposed amendment to ACN and the other CLECs, and rejects SBC Illinois' efforts to amend ACN's agreement in at least five different ways:

Rejection No. 1: "First, the *USTA II* decision did not vacate the Commission's rules for high-capacity loops" [fn omitted].

Rejection No. 2: "Second, SBC remains obligated to provide unbundled switching and transport under the terms of the parties' (sic) pursuant to the FCC's SBC/Ameritech Merger Conditions, [fn omitted] and in some cases, state law, regulation, tariff and/or order."

> Rejection No. 3: "Third, SBC is required in most of its region to continue to provide loops, transport and switching pursuant to its Section 271 obligations and commitments."
>
> Rejection No. 4: "Fourth, *USTA II* did not find that any of the vacated UNEs were not or could not be required by Section 251. . . Thus, SBC's proposal to eliminate these UNEs across the board would be an unlawful interpretation of Section 251 that could not be approved by a state commission under the terms of Section 252(e)(2)(B)."
>
> Rejection No. 5: "Finally, as you know, the FCC is soon expected to release an interim order that may significantly affect the terms of any proposed amendment. While we look forward to constructive engagement with SBC, we therefore propose that the parties defer negotiation of SBC's proposal until all the parties have had the opportunity to consider the new FCC interim order once it is released." (See ACN Attachment 6).

Of course, ACN's filing in this proceeding makes clear that ACN did not mean what it said in Rejection No. 5 above. Even though the FCC's *Interim Order* has been released and is very specific as to the path forward, ACN and the other CLECs joining in that filing now say that any efforts to determine proper amendments to the agreements are a "waste of time"[30] and they refuse to participate in this proceeding, asking instead that it be dismissed.

b. McLeodUSA Telecommunications Services, Inc.

Another CLEC, McLeodUSA, also responded, but never constructively engaged in negotiations or informal dispute resolution activities. In fact, like ACN, McLeodUSA effectively rejected SBC Illinois' proposals and requests that its agreement be amended. Like ACN, McLeodUSA was provided the three notices (TRO, Lawful UNE and USTA II) outlined by SBC Illinois above. See McLeodUSA Attachment 1. Also like ACN, when McLeodUSA did not respond to the first TRO letter, SBC Illinois delivered a reminder letter dated November 14, 2003, via e-mail to McLeodUSA representative, James LeBlanc. See McLeodUSA Attachment 2. Finally, following some unfruitful communications and exchanging of documents, the parties

[30] ACN *et al*. at 10.

agreed on a timeframe for negotiating an amendment (February 15 to May 15, 2004) by letter dated January 15, 2004. See McLeodUSA Attachment 3. The parties had not reached an agreement by the time the USTA II decision was released, and McLeodUSA was sent the second notice letter, dated March 11, 2004, including SBC Illinois' proposed Lawful UNE Amendment. See McLeodUSA Attachment 1. In response, McLeodUSA sent SBC Illinois a letter, this time completely rebuffing SBC Illinois' efforts to negotiate an amendment at all, claiming that no change in law had occurred, and no dispute had yet arisen. See McLeodUSA Attachment 4. Of course, this was in direct opposition to SBC Illinois' stated position. On April 20, 2004, SBC Illinois responded, urging McLeodUSA to seriously consider the amendment, and reiterating the statements made in previous letters, *i.e.,* that it would proceed to formal dispute resolution if agreement was not reached. See McLeodUSA Attachment 5. McLeodUSA responded on May 13, 2004, insisting that no change in law event had occurred and refusing to further discuss the amendment of its existing agreement to eliminate any unbundling obligations. See McLeodUSA Attachment 6. As it signaled by advising SBC Illinois that it would assert Section 271, state law and merger condition arguments against any argument SBC Illinois might make that unbundling obligations had been lifted, McLeodUSA clearly had no intention of ever agreeing to amend its interconnection agreement to remove any unbundling obligations. SBC Illinois delivered its third notice letter (the July 13, 2004 USTA II letter) to McLeodUSA, as well as the other CLECs, and, since the parties remain at impasse, has included them in this proceeding.

As the situations with ACN and McLeodUSA illustrate,[31] it is clear that the CLECs have had every opportunity to negotiate conforming language with SBC Illinois, but have failed or

[31] Of course, the situations with ACN and McLeodUSA in Illinois are not identical to that of every other Illinois CLEC. In many cases, CLECs did not respond at all to SBC Illinois' notice letters, or sent different types of rejections than the ones sent by ACN or McLeodUSA. However, the ACN and McLeodUSA facts exemplify

refused to do so. It is equally clear that the CLECs have no interest in doing so. Indeed, their pleadings in this very case make that unequivocally clear. Despite *USTA I*, despite the *Triennial Review Order*, and despite *USTA II*, the CLECs *still* insist it is "premature" to negotiate over any change-in-law, and *still* insist, after eight years, that they are entitled to maximum unbundling. Perhaps more than anything else, these statements underscore the futility of insisting on still more notices from SBC Illinois, to be followed by still more refusals to engage by the CLECs, before this Commission is called upon to ensure that the parties' agreements conform to governing federal law.

As the FCC has made clear, the duty to negotiate in good faith applies to ILECs and CLECs alike. *See Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 706. What is more, failure "to negotiate *any* subset" of the FCC's new rules constitutes "bad faith." *Id.* Despite every opportunity, the CLECs have utterly failed to engage with SBC Illinois in meaningful negotiations. Granting their motions to dismiss – on the theory that SBC Illinois has been unable to force them to the table to negotiate appropriate agreement language – would serve only to reward such recalcitrance and encourage similar behavior in the future.

E. NO OTHER SOURCE OF LAW REQUIRES CONTINUED UNBUNDLING HERE

In an attempt to delay the inevitable, the CLECs point to several sources of authority that, they claim, continue to mandate unlimited unbundling for as far as the eye can see. The short answer to these contentions is that they are beside the point on a motion to dismiss. If parties feel that the language in their existing agreements is justified on the basis of some source of authority other than the FCC's unbundling rules, they are free to argue as much at the appropriate stage in this proceeding. In no circumstance could such claims plausibly be grounds

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the situation in which SBC Illinois finds itself. It has attempted to engage the CLECs in an inherently two-party activity – negotiation – but has been routinely rebuffed.

for dismissing SBC Illinois' Complaint at the outset. In all events, the CLECs' claimed justifications for continued unbundling are flatly contrary to binding federal law.

1. The SBC/Ameritech Merger UNE Condition Has Expired

ACN *et al.* claim that SBC Illinois remains obligated to provide UNEs under the terms and conditions of the *SBC/Ameritech Merger Order*.[32] ACN *et al.* at 18-19. They also note that the FCC is currently considering a declaratory proceeding that will determine SBC's ongoing obligations, if any, under this theory. *Id.*

SBC Illinois agrees that the Commission should leave that issue to the authoritative disposition of the FCC. Nonetheless, should the Commission address the issue, it should find that the CLECs' interpretation of the *SBC/Ameritech Merger Order* is incorrect. The relevant condition attached to that order provided:

> 53. SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.

Id. Appx. D, ¶ 53 (footnote omitted). This paragraph's obligations have expired for two reasons. First, as noted in the last sentence, the obligations became "null and void" upon a "final and non-appealable Commission order in the UNE remand proceeding." *Id.* Even reading this language

[32] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and*

at its broadest – *i.e.*, treating the *Triennial Review Order* as an extension of the UNE remand proceeding – the *Triennial Review Order* is indisputably "final and non-appealable." Any obligation imposed by paragraph 53 is therefore completely "null and void." Second, if there were any doubt, the *Triennial Review Order* was upheld by the D.C. Circuit to the extent that it cut back on unbundling obligations, and, as noted above, the Supreme Court denied certiorari in *USTA II*. The decision in *USTA II* therefore counts as a "final, non-appealable judicial decision" providing that certain UNEs are "not required to be provided by SBC/Ameritech." *Id.*[33]

SBC Illinois' interpretation is confirmed by an FCC letter opining – as to TELRIC pricing in particular – that if the "Supreme Court conclud[ed] the TELRIC litigation by denying certiorari," the substantively similar *Bell Atlantic/GTE Merger Order* "would not independently impose an obligation to follow [the] finally invalidated pricing rules." Letter to Verizon from Dorothy Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000). The same is true here: Now that the Supreme Court has concluded the *TRO* litigation by "denying certiorari" in the *USTA II* litigation, there is no conceivable basis for finding an "obligation to follow" the conditions of the *SBC/Ameritech Merger Order*.[34]

310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279 (1999).

[33] SBC Illinois does not waive the argument that *USTA I* was also a "final, non-appealable judicial decision" for purposes of paragraph 53.

[34] ACN *et al.* also argue that this Commission should enforce the *Merger Order* due to paragraph 73:

> SBC/Ameritech shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions (e.g., review and approve interconnection agreement amendments, or determine if telecommunications providers violate requirements associated with the promotional discounts).

That paragraph does not apply. *First*, as conclusively demonstrated in the text, paragraph 53 has expired anyway. *Second*, even if the *Merger Order*'s condition were active, this Commission would lack jurisdiction to enforce a condition that is currently the subject of a declaratory action at the FCC. Indeed, the ACN group's own petition (as filed with the FCC) admits that state commissions have universally left the interpretation of similar merger conditions to the FCC. *See* Petition for Declaratory Ruling at 8 & n.15, CC Docket Nos. 98-141 & 98-184 (FCC filed Sept. 9, 2004) (attached to ACN *et al.* Motion to Dismiss).

2. State Law Cannot Mandate Unbundling That Is Inconsistent With Federal Law

Movants also claim that SBC Illinois is still subject to state law that mandates unbundling. ACN *et al.* at 19-20. It claims that these unbundling obligations survive federal preemption due to sections 251(d)(3), 252(e)(3), and 261 of the 1996 Act, which "expressly preserve the authority of state commissions to enforce their own requirements" as to unbundling. *Id.* at 20. Along the same lines, the CLECs argue that this Commission must "undertake an independent analysis of Section 251 above and beyond the FCC regulations." *Id.* at 7. On this view, they claim that this Commission must make an affirmative "non-impairment finding" with regard to any element that is discontinued before removing it from SBC Illinois' interconnection agreements. *Id.* at 8.

These claims are incorrect. Although the 1996 Act allows state commissions to play a role in implementing the Act, only the FCC can make an impairment determination that requires an element to be unbundled. The Supreme Court held as much in 1999, *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) (§ 251(d)(2) "requires *the Commission* to determine on a rational basis *which* network elements must be made available"), and the D.C. Circuit reconfirmed this view in *USTA II*: Where the FCC had tried to allow state commissions to make impairment findings, the D.C. Circuit held that *only* the FCC can make the impairment determinations that trigger the requirements for unbundling. *See USTA II*, 359 F.3d at 594.

Similarly, in its *Triennial Review Order*, the FCC made clear that states are *not* free to reconsider federal policies and impose an unbundling requirement — whether under federal or state law — that the FCC has already considered and expressly rejected. The FCC ruled that in circumstances where "the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," states are effectively barred from adopting any

unbundling requirement because it would be "unlikely that such decision would fail to conflict with . . . implementation of the federal regime." *Triennial Review Order* ¶ 195.

Where no such valid federal finding exists, any state imposition of any unbundling is *per se* inconsistent with federal law and is therefore preempted. This is precisely what the Virginia commission recently held, explaining that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)" and that any state-commission imposed UNE obligations would therefore "violate federal law." Order, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004). Similarly, the New York PSC has recognized that when a regulation requiring an ILEC to provide a UNE is eliminated — whether by action of the FCC or a court — the ILEC is "permit[ted] . . . to cease performance of [that] prior obligation if it so desires." Order Resolving Complaint, *Complaint of MetTel and Broadview against Verizon New York Inc. Concerning Alleged Discriminatory and Anti-Competitive Abuse of OSS Changes*, Case 04-C-0538, at 9 (N.Y. P.S.C. June 3, 2004).

The same reasoning applies where a court of appeals has found that there is no valid FCC finding of impairment. As the D.C. Circuit has consistently found, unbundling in the absence of genuine impairment undermines the 1996 Act's central goal of promoting facilities-based competition. *See, e.g., United States Telecomm. Ass'n v. FCC*, 290 F.3d 419, 424-25 (D.C. Cir. 2002) ("*USTA I*"). Because the 1996 Act preserves only those state regulatory requirements that are "*consistent* with" and "do[] *not* substantially prevent implementation of the requirements of this section [251]," 47 U.S.C. § 251(d)(3) (emphases added), state commissions have no authority to require provision of UNEs that a federal court has declared unlawful.[35]

[35] The 1996 Act's provision that state commissions can arbitrate "open issues," 47 U.S.C. § 252(c) (cited at ACN *et al.* at 7 & n.19) does not even remotely support the ACN group's position here. ACN *et al.* cite no

3. Section 271 Does Not Authorize The Commission To Require Continued Unbundling

The FCC has construed Section 271 to impose an obligation on BOCs, such as SBC Illinois, independent of their obligation to provide UNEs under Section 251(c)(3), to provide access to "loop[s]," "transport," "switching," and "databases and associated signaling." 47 U.S.C. §271(c)(2)(B)(iv)-(vi), (x); *see Triennial Review Order* at ¶¶ 653-59. Some CLECs claim that SBC Illinois "has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271." ACN *et al.* at 20. They urge this Commission to establish "a just and reasonable and generally available rate" for any element provided under section 271. *Id.*

But this view is wrong on multiple levels. *First*, elements provided under section 271 *are not UNEs* in the first place. Any obligation under section 271 is "independent" of "any unbundling analysis under section 251." *Triennial Review Order* ¶ 653. Moreover, the FCC has held – and this Commission has very recently acknowledged[36] – that TELRIC prices (*i.e.*, UNE prices) *do not apply* to section 271 elements. Indeed, the FCC held that "TELRIC pricing" or other "forward-looking pric[ing]" for section 271 elements would be "*counterproductive*" (*UNE Remand Order* ¶ 473 (emphasis added)) and is "*no[t] necessary* to protect the public interest" (*Triennial Review Order* ¶ 656 (emphasis added)). The D.C. Circuit upheld the FCC's determination, holding that there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). Thus,

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authority that treats the term "open issues" as a license to impose perpetual unbundling where the FCC and/or the D.C. Circuit have authoritatively pronounced that certain unbundling requirements are inconsistent with the pro-competitive goals of the Act.

[36] *See XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Amendatory Arbitration Decision, Docket No. 04-0371, slip op. at 67 (Ill. Commerce Comm'n Oct. 28, 2004) ("TELRIC pricing is not accorded to 271 UNEs under federal law.") ("*XO Arbitration Decision*").

the mere fact that there might be unbundling obligations under section 271 cannot be used to perpetuate *UNE* obligations under interconnection agreements — the two obligations are entirely separate and unrelated.

Second, this Commission simply has no authority to enforce SBC Illinois' obligations under section 271. As the FCC has held, Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*[37] at ¶¶ 17-18 (emphases added). Courts have also held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing a BOC's compliance with section 271. *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).

Indeed, the text of section 271 is chock full of references to the *FCC's* duties. *See* 47 U.S.C. § 271(d)(3), (4), (6).[38] By contrast, the only role that state commissions can play is that of "consult[ing]" with the FCC, so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of []section [271](c)." *Id.* at § 271(d)(2)(B) (emphasis added). Congress gave state commissions no role *after* approval of such an application, and the FCC has never held that it has any duty to consult with a state commission before ruling on a complaint under section 271(d)(6).

Indeed, in a very recent arbitration decision, this Commission recognized that, while it could tell the parties to "incorporate what the FCC said about 271 UNEs into your ICA, and it will have whatever effect the FCC said it will have," nonetheless it could not "alter[] . . . FCC

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[37] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, at ¶ 17 (1999) ("*InterLATA Boundary Order*").

[38] Indeed, the FCC is currently exercising those duties. For example, the FCC just held that Section 271 unbundling obligations do not extend to fiber-to-the-home or fiber-to-the-curb loops, the packetized functionality of hybrid loops, or packet switching. *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Section 160(e)*, Memorandum Opinion and Order (released Oct. 27, 2004) (FCC 04-254).

rulings," nor could it "attempt[] to define the extent to which Section 271 governs the parties' conduct." *XO Arbitration Decision* at 66. "Indeed, if we permitted the parties to ignore the FCC's directives regarding 271 UNEs, *then* we would be contravening both the FCC and the Federal Act." *Id.* This decision – even assuming it is correct that 271 obligations must be incorporated into interconnection agreements, which SBC Illinois continues to dispute – thus acknowledges the general rule that state commissions have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of section 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).[39]

F. DAMAGES, COSTS AND ATTORNEY'S FEES

Certain of the CLECs claim that the Commission should award them damages, costs and attorney's fees under Section 13-516(a)(3) incurred in responding to the Complaint. See *e.g.*, Joint CLECs at 23-24; Access One *et al*. at 12-13; XO at 6-7; TDS Metrocom at 4-5; McLeodUSA at 4-5. They contend that SBC Illinois violated the terms of its interconnection agreements with these carriers by filing the Complaint without following the change of law and dispute resolution provisions. Therefore, they ask the Commission to direct SBC Illinois to

[39] It is also irrelevant whether, as some CLECs claim, SBC Illinois has misjudged the state of the law as to high-capacity loops and/or entrance facilities. Joint CLECs at 20-23. As noted, SBC Illinois' Amendment already encompasses any possible decision that the FCC might make in its final rules. The core point at this stage of the proceeding is that any alleged errors in SBC Illinois' view of federal law are not a reason for dismissal. Instead, to the extent the CLECs believe that SBC Illinois' discussion of federal law is incorrect – or to the extent they wish to propose alternative contract language that they believe would more accurately implement binding federal law – they are free to do so at the appropriate stage in this proceeding.

reimburse them for legal fees and expenses incurred in this proceeding under Section 13-516(a)(3).[40]

The CLECs' contentions are without merit. It is well established that Section 13-516, like other fee shifting statutes, is to be strictly construed. *Globalcom, Inc. v. Ill. Comm. Comm. and Ill. Bell Telephone Co.*, Nos. 1-02-3605, 1-03-0068 Consol., slip op. at 35 (1st Dist. 2004). Section 13-516 is not applicable to this proceeding.

First, Section 13-516 only applies to complaints filed under Section 13-514. SBC Illinois does not contend that the CLECs have violated Section 13-514 and did not file its Complaint pursuant to the procedures specified in Section 13-515. SBC Illinois filed its Complaint pursuant to Section 10-108. Since the Joint CLECs are *respondents*, they cannot unilaterally transform the nature of this proceeding and, thus, may not invoke Section 13-516.

Second, Section 13-516 can be invoked only if the Commission finds a violation of Section 13-514 of the Act. Section 13-514 is directed at conduct that "impedes the development of competition" in telecommunications markets. SBC Illinois' Complaint has nothing whatsoever to do with impeding competition. SBC Illinois simply wishes to conform its interconnection agreements in a manner that is consistent with federal law. In effect, the CLECs are attempting to convert Section 13-516 into a general grant of authority to the Commission to sanction a filing which, in the CLECs' view, is premature. See *e.g.* Joint CLECs at 23-24. Section 13-516 cannot be used in this manner.

Finally, contrary to the CLECs' contentions, the standards set forth in Sections 13-514(8) and (12) are not met in any event. Sections 13-514(8) and (12) provide that carriers may file

[40] Notably, the CLECs meet themselves coming and going on these issues of procedure. If, as the CLECs allege, SBC Illinois cannot use state law complaint procedures to bring this dispute to the Commission, how could Section 13-516 be applicable?

complaints under Section 13-514 if, *inter alia*, another carrier is:

> "(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to customers. . . [or]
>
> (12) violating an order of the Commission regarding matters between telecommunications carriers." 220 ILCS 5/13-514(8), 5/13-514(12).

If the Commission were to find that a respondent had engaged in such conduct, Section 13-516(a)(3) allows for the award of attorney's fees and costs. However, the CLECs seem to have missed a crucial link in the chain of statutory authority. *There is no complaint pending against SBC Illinois* under Section 13-514 or otherwise. The Complaint is pending against the CLECs. Therefore, the Commission cannot find a violation of Section 13-514 against SBC Illinois.

Moreover, SBC Illinois' conduct does not comport with either 13-514(8) or (12). The filing of this Complaint does not unreasonably delay, increase the cost, or impedes the availability of telecommunications services to consumers as required under Section 13-514(8). 220 ILCS 5/13-514(8). This Complaint involves legal issues – not the provision of services to consumers. The fact that the CLECs will incur costs as a result of participating in this proceeding is simply part and parcel of being a regulated carrier in Illinois. SBC Illinois could just as well complain that the *CLECs* have imposed costs on *SBC Illinois* because of their failure to execute appropriate change of law amendments. The mere fact that the CLECs take a different view of the sufficiency of the notice and dispute resolution procedures followed by SBC Illinois does not constitute a "violation" of SBC Illinois' interconnection agreements.

The CLECs argue that Section 13-514(12) is triggered whenever a provision in an interconnection agreement is violated. Such a reading is entirely too broad. Given the draconian sanctions in Section 13-516, Section 13-514(12) must be read in light of the other *per se*

"prohibited actions" in Sections 13-514(1) through (11). If *any* violation of an interconnection agreement contravenes Section 13-514(12), then the constraints in Section 13-514(8) on the kinds of interconnection disputes that may be brought under Section 13-514 would be nullified. Such a reading does not comport with accepted canons of statutory construction. In short, litigation costs associated with resolving this legal dispute are simply not cognizable under either Section 13-514(8) or (12).

IV. SBC ILLINOIS' REVISIONS TO THE PERFORMANCE MEASUREMENTS TARIFF ARE JUST AND REASONABLE

SBC Illinois has made just two changes to its performance measurements tariff, each of which make it clear that the existing Performance Measurements Tariff fully complies with Section 13-801. (Ill. C.C. No. 20, Part 2, Section 10). Staff did not address the changes to SBC Illinois' Performance Measurements Tariff, and apparently agree that is just and reasonable. The CLEC Coalition proposes to delete two sentences. For the reasons discussed in the resale section and the General Terms and Conditions sections, this language should be retained.

V. CONCLUSION

The issues raised by SBC Illinois' complaint are ripe for review by this Commission. The CLECs' failure to engage in meaningful negotiations should not be used by them as a means to thwart efforts to bring their interconnection agreements into conformance with the binding judgments of the FCC and the courts. The Commission should deny the motions to dismiss.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

_____

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CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' CONSOLIDATED RESPONSE TO THE CLECS' MOTIONS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on November 8, 2004.

Mark R. Ortlieb

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